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In the Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, ET AL.,
PETITIONERS

v.

SYLVIA BURWELL, ET AL.

(additional captions listed on inside cover)

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, FIFTH, TENTH AND
DISTRICT OF COLUMBIA CIRCUITS

BRIEF OF *AMICI CURIAE* RELIGIOUS INSTITUTIONS SUPPORTING PETITIONERS

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PRIESTS FOR LIFE, ET AL.,
PETITIONERS
v.
SYLVIA BURWELL, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL.,
PETITIONERS
v.
SYLVIA BURWELL, ET AL.

GENEVA COLLEGE, ET AL.,
PETITIONERS
v.
SYLVIA BURWELL, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL.,
PETITIONERS
v.
SYLVIA BURWELL, ET AL.

EAST TEXAS BAPTIST UNIVERSITY, ET AL.,
PETITIONERS
v.
SYLVIA BURWELL, ET AL.

LITTLE SISTERS OF THE POOR, ET AL.,
PETITIONERS
v.
SYLVIA BURWELL, ET AL.

QUESTION PRESENTED

This brief addresses the following question, which is central to this Court's resolution of the narrower question on which review has been granted:

Do the Religious Freedom Restoration Act and the First Amendment allow bureaucrats or judges, in determining whether a governmental mandate imposes a substantial burden on religion, to second-guess a religious organization's view of the religious implications of complying with that mandate?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

This is a case of immense importance to all houses of worship and, therefore, to the denominations and other organizations to which they and their ministers belong—including these *amici*, who are listed in the Appendix. That is so, not so much because of the narrow issue of contraception coverage—which is important to some religious bodies but not to others—but because of the legal theory advanced by the Government here and adopted by a few courts of appeals in rejecting petitioners' claims. That theory is an affront to the religious liberty of *all* religious bodies—including *amici*—because it would allow judges and other officials to second-guess those bodies' judgments about the religious implications of government mandates of all types, under the guise of determining whether the mandate's burden on religion is "substantial."

Indeed, the Government's theory would easily allow it to extend the very contraception mandate at issue here to all houses of worship. While houses of worship are currently exempt from that regulation, the Government insists that this exemption is based on purely administrative considerations, not on any principle derived from the First Amendment or the Religious Freedom Restoration Act (RFRA). Accordingly, this or a future Administration could easily revoke that exemption at any time, thereby requiring health plans created by houses of worship to provide religiously sensitive products like abortifacient drugs.

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[1] No one other than *amici*, their members and counsel authored any part of this brief, or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

But an even bigger problem for all of the *amici* is the legal theory by which the Government—and multiple courts of appeals – have sought to justify this intrusion into religious liberty. That theory would also justify other intrusions into the religious liberty of houses of worship in a variety of settings, and in ways that would be of concern to socially progressive as well as socially conservative groups. Boiled to essentials, the Government's theory holds that, when a religious claimant believes a regulatory mandate makes the claimant complicit in what it sincerely views as sin or evil, the resulting burden on religion cannot be considered "substantial" for RFRA purposes if a bureaucrat or judge does not find the complicity concern compelling—that is, if the judge or bureaucrat believes there are too many "dominos" between the one the religious claimant is being required to knock over and the result to which the claimant objects. And absent a substantial burden, there is no RFRA defense to regulatory mandates—which are an increasingly common feature of today's legal landscape.

Imagine, then, the kinds of mandates that would be immune from RFRA defenses under this theory. Suppose for example that a government insists on obtaining a house of worship's confessional, donation or membership records—perhaps funneled through a third party—for use in apprehending undocumented aliens, draft dodgers, or deadbeat dads. And suppose that providing such records to the government clearly violates the house of worship's religious beliefs on confidentiality of member-related data. Under the Government's theory, no matter how strongly the house of worship believes such cooperation would be religious anathema, and no matter how large the penalty for non-compliance, the house of worship would have no

possible RFRA defense—that is, no right even to have its religious interests *balanced* against the government's interest—if a bureaucrat or judge concludes in his secular judgment that the organization's level of complicity is too attenuated for the mandate to create a "substantial" burden.

Or imagine that the current Administration proceeds with its announced plan to require health plans to pay for elective sex-change surgeries—or that the next administration does the same with sexual-orientation "reparation" therapy or mandated funding for abortion—and that it refuses to extend the "house of worship" exemption to these mandates. Houses of worship, including those believing such procedures profoundly sinful, would then be virtually forced to facilitate them. But again, under the Government's theory, these organizations would lose any possible RFRA defense if a judge or bureaucrat disagreed with their religious assessment that the connection between their actions and those services was strong enough to make them complicit.

It is difficult to imagine a more serious intrusion into institutional religious liberty. Yet under the Government's theory, neither RFRA nor the First Amendment would provide a defense to such mandates or to the religious-liberty intrusions they create. Fortunately, this Court can rectify that situation by holding that a mandate gives rise to a substantial burden whenever (a) the religious claimant sincerely believes that to act as the mandate directs substantially burdens her free exercise and (b) the penalty or other consequence for non-compliance is objectively substantial.

STATEMENT

Petitioners are religious non-profits that provide health insurance to their employees. Under the Affordable Care Act, petitioners' plans are required to provide "preventative care" without "any cost sharing." 42 U.S.C. 300gg-13(a). In interpreting this statute, the Department of Health and Human Services (HHS) determined that many forms of contraceptives—ranging from garden-variety birth-control pills and patches up to the morning-after pill and *ella*—should be a part of "preventative care."

1. Recognizing the potential for religious objections, HHS exempted houses of worship and hierarchical organizations of which they are part. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); 45 C.F.R. 147.131(a). However, HHS required other religious non-profits to "take either of two actions: notify HHS that it objects to providing contraceptive coverage *and* identify its insurers and TPAs [third-party administrators], or notify its insurers and TPAs directly using a form provided by the government." Response to Petition, *Priests for Life*, Nos. 14-1453 and 14-1505 at 14 (emphasis added). The rules provide no way for the Government to incentivize the provision of contraception through the insurer independently of the actions to which petitioners object. Indeed, various other laws protect the insurance company and the non-profit from a government's commandeering the insurance plan without the non-profit's authorization. Petition for Certiorari, *Little Sisters of the Poor*, no.15-105, at 8-9; *see also* Opening Brief, *East Texas Baptist* University *et al.* at 32.

Faced with the choice of authorizing the flow of religiously objectionable contraception drugs or facing

crippling fines, petitioners filed suit, claiming the regulations violate RFRA. Specifically, petitioners object as a religious matter to signing the form or giving the Government the names of their TPAs. *See, e.g.*, Emergency Application for Injunction at 30, *Wheaton College* v. *Burwell*, No. 13A1284 (U.S. 2015) ("It is undisputed here that Wheaton's religious beliefs prohibit it from *signing EBSA Form 700*.") (emphasis added). Relatedly—but independently—petitioners also object to being forced to participate in providing a product they find religious objectionable. And petitioners object to the Government's hijacking their contracts with third parties—in essence, utilizing *their* private contracts to accomplish public purposes. *See* Opening Brief, *East Texas Baptist University et al.* at 32, 39. Thus, their objection does not depend on whether their employees get contraception or even in whether the Government finds a way to provide their employees contraception. Instead, it is rooted in affirmative actions that *they* must take—or face crippling fines. *See Id.* at 51-52.

The non-profits also have no objection to the Government's *learning* they have a religious objection to the mandate—indeed, the litigation here is ample notice. Rather, they object that, to qualify for the accommodation, they must provide additional internal information in a manner that, in their religious judgment, makes them complicit in the contraception that will occur as a predictable result of that action.

2. The Government and the courts of appeals that have ruled against petitioners refused to defer to—or in most cases even acknowledge—this religious judgment about the consequences of petitioners' compliance with HHS's "accommodation." Instead, the Gov-

ernment and these courts of appeals have hidden behind a misframing of the issue. For example, the Government claims that the question presented here is '[w]hether RFRA entitles petitioners to *prevent the government* from arranging for third parties to provide separate coverage to the affected women," Response to Petition, *Priests of Life* at i (emphasis added)—even though petitioners have no *power* to prevent HHS from arranging such coverage independently, and no *interest* in doing so. This formulation thus misleadingly focuses on actions the Government is required to take under the regulation, rather than on actions the regulation requires of petitioners.

When they have acknowledged that the HHS regulation actually imposes obligations on petitioners, the courts of appeals have sought to second-guess petitioners' religious judgments by trivializing the required actions. For example, the Tenth Circuit claimed that the Government can require mere "administrative tasks" without burdening religious liberty. *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 794 F.3d 1151, 1192 (10th Cir. 2015); *see also Priests for Life* v. *Dept. of Health and Human Servs*, 772 F.3d 229, 246-47, 251 (D.C. Cir. 2014). The court held that, because there is no objection to signing forms generally, the signing of the form at issue here cannot impose a substantial burden. *Little Sisters*, 794 F.3d at 1191. Alternatively, the court opined that providing HHS a piece of internal information—the name of a TPA—"is at most a minimal burden and certainly not a substantial one." *Id.* at 1193.

But both approaches rest upon an implicit second-guessing of the petitioners' religious judgment that signing the form and providing the information *are* a

substantial burden on petitioners' religion. That is because, like pushing over the first in a row of dominos, those actions will set off a chain of events that will lead to the providing of contraception that petitioners believe deeply sinful, thereby (in petitioners' view) making petitioners complicit in that sin.[2]

The Government appears to concede that it may be a substantial burden under RFRA to require an objecting religious institution to provide contraception directly. However, the Government contends that, as a matter of law, there can be no such burden (or no substantial burden) when a religious objector merely aids the Government's efforts to force *others* to provide the objectionable contraception. That position, however, necessarily rests on a second-guessing of the religious institution's religious judgment about the religious consequences of such assistance—that is, about the religious consequences of knocking over the first domino in a chain that will inevitably lead to a religiously objectionable result.

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[2] *See, e.g. Little Sisters of the Poor* v. *Burwell*, 799 F.3d 1315, 1318 (10th Cir. 2015) (Hartz, J., dissenting from denial of reh'g en banc) ("I am aware of no precedent holding that a person's free exercise was not substantially burdened when a significant penalty was imposed for refusing to do something prohibited by the person's sincere religious beliefs ... " *Priests for Life* v. *HHS*, 808 F.3d 1, 9 (D.C. 2015) (Brown, J., dissenting from denial of reh'g en banc) ("[W]here civil authorities may conclude an individual has 'wash[ed his] hands of any involvement,' adherents of a faith may examine the same situation and, in their religious judgment, reach the opposite conclusion. Pontius Pilate, too, washed his hands, but perhaps he perceived the stain of complicity remained.") (alteration in original) (citation omitted).

SUMMARY OF ARGUMENT

As Judge Hartz has noted, the substantial burden question in this case "has little to do with contraception and a great deal to do with religious liberty." *Little Sisters of the Poor* v. *Burwell,* 799 F.3d 1315, 1316-17 (10th Cir. 2015) (Hartz, J., dissenting from denial of rehearing en banc). That is because, regardless of one's own beliefs about contraception or moral complicity, this case represents an attempt by bureaucrats and judges to second-guess these institutions' religious beliefs on those important religious issues—under the guise of determining whether the HHS mandate imposes a substantial burden on their religion.

I. Petitioners believe that to act as the HHS mandate directs is akin to knocking over the first in a line of dominoes designed to lead to the provision of contraception for their employees. The Government's response to the resulting RFRA defense is that the regulation puts in place enough dominoes to alleviate any genuine complicity. And because the Government sees nothing morally problematic about the act petitioners must take (signing a form or providing internal information to third parties), the Government refuses to accept petitioners' judgment that being forced to knock over the first domino substantially burdens their religion.

This theory—that there are enough dominoes to eliminate any substantial burden—would logically allow the Government to extend the contraceptive mandate to *all* insurance plans—including those operated by houses of worship, as well as other morally problematic areas. To be sure, some houses of worship would not object to signing the forms at issue in this case. But if the regulation here stands, sooner or later

the Government will inevitably ask other religious objectors—including houses of worship—to knock over analogous "first dominoes" in order to serve other purposes that those organizations find abhorrent.

II. There is an easy way to prevent these conflicts—indeed, a way compelled by RFRA and the First Amendment. This Court should rule that, if a religious objector sincerely *believes* an action mandated by law substantially burdens its religious exercise and there is a nontrivial penalty for defiance, there is a substantial burden on religious liberty. This test, rooted in settled case law, allows governments to act according to their wishes in most cases—but not to deny that substantial burdens on religious liberty occur when they enlist religious individuals and institutions to assist in their goals.

Nor is there any reason to fear that such a test will turn RFRA into a "license" to violate generally applicable laws. The requirements that the belief at issue be sincere, and that it be a *religious* belief, provide substantial protection against such an outcome. In addition, when the government's actions satisfy strict scrutiny—as they would in cases involving abuse of children—courts could continue to compel even houses of worship to knock over as many dominoes as necessary to satisfy compelling government interests.

ARGUMENT

I. The Government's Theory Would Justify Substantial Intrusions Into the Religious Liberty of All Houses of Worship, Denying Them Any Right To Have Religious Burdens Balanced Against Governmental Interests In A Wide Array Of Settings.

The Government's substantial burden analysis—like that of some courts of appeals—carries substantial risks for houses of worship. Indeed, its theory would risk imposing additional complicity requirements on houses of worship not only in the context of health insurance, but in numerous other aspects of religious life—thereby creating enormous potential for social strife centered on religious belief and practice.

A. The Government's justification for the intrusion here would logically justify similar intrusions into the liberty of houses of worship regarding their healthcare programs.

In this litigation, the Government has repeatedly argued—and some courts of appeals have held—that the signing of a form and the subsequent providing of information to the health insurer (or giving the Government the name of the insurer via the form) is not a substantial burden as a matter of law. *E.g.*, Response to Petition for Certiorari, *Priests for Life* v. *Burwell*, Nos. 14-1453 and 14-1505 at 14-21.[3]

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[3] *Accord Grace Schools* v. *Burwell*, 801 F.3d. 788, 801, 807 (7th Cir. Sep. 4, 2015); *Catholic Health Care System* v. *Burwell*, 796 F.3d 207, 218-25 (2d Cir. 2015); *Little Sisters of the Poor Home for the Aged* v. *Burwell*, 794 F.3d 1151, 1178-87 (10th Cir. 2015); *East Texas Baptist University* v. *Burwell*, 793 F.3d 449, 459 (5th Cir. 2015); *Geneva College* v. *Sec'y Dept. of Health and Human*

1. As previously explained, that conclusion necessarily rests on an unstated premise that RFRA allows judges and bureaucrats to second-guess religious judgments about the religious consequences of a religious non-profit's actions. To continue the domino analogy, the Government's theory is that if a judge or bureaucrat believes there are too many dominoes between the action required of the religious body and the result the body finds objectionable, she can substitute her judgment for that of the religious group and thus conclude that the requirement imposes no substantial burden on religion—even though the religious body strongly believes it does.

Setting aside for now its inconsistency with precedent, the Government's theory could be applied in a variety of settings against a variety of religious adherents, including houses of worship. Indeed, the Government's phrasing at the certiorari stage indicates it believes the test applies to *all* "religious objectors." Response to Petition for Certiorari at 15, *Priests for Life* v. *Burwell*, Nos. 14-1453 and 14-1505. Moreover, that theory would apply, not only in cases under RFRA, but also presumably in First Amendment free exercise cases like *Church of Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520 (1993), in which courts apply strict scrutiny to government actions targeting specific religions.

2. Such a ruling would thus gore the religious oxen of both "progressive" and "conservative" religious bodies. That is shown by three hypotheticals:

First, under the Government's theory, HHS could extend the very contraception mandate at issue here

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Servs, 778 F.3d 422, 442 (3d Cir. 2015); *Priests for Life* v. *Dept. of Health and Human Servs.*, 772 F.3d 229, 256 (D.C. Cir. 2014).

to houses of worship, so long as HHS allowed them to either fill out the form required of petitioners here or notify HHS of their objection and the name of their insurer. Many of the affected houses of worship, like the non-profits here, would feel that doing either of these things substantially burdens their religious beliefs by requiring them to be an instrument in providing contraception. *See infra* II.B (describing the dual nature of the burden asserted by the non-profits); EBSA Form 700 (noting that the form is "an instrument under which the plan is operated").

Although not all the *amici* share these religious convictions, denominations that oppose the use of potential abortifacients on religious grounds claim tens of millions of members nationwide.[4] Yet, under the Government's theory, those houses of worship would have no ability—under RFRA or the Free Exercise Clause—to challenge such a requirement, because the resulting burden on religion would be deemed insubstantial as a matter of law. Indeed, under that approach, these houses of worship would have no ability to challenge a hypothetical federal requirement, similar to that recently adopted in California, requiring

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[4] The affected denominations would include, at a minimum, the Roman Catholic Church, *amicus* Lutheran Church—Missouri Synod, and the Southern Baptist Convention. *See* Catholic Catechism § 2370; Pam Belluck and Erik Eckholm, *Religious Groups Equate Some Contraceptives With Abortion*, N.Y. TIMES, Feb. 17, 2012 at A13. Adherents of these three denominations alone make up between twenty-five and thirty percent of the national population. *See* Religious Landscape Study, PEW RESEARCH, available at: http://www.pewforum.org/religious-landscape-study/.

even religious houses of worship to cover in their insurance plans elective abortions.[5]

Second, the Government's theory would logically extend to sex-change procedures. In fact, HHS is already considering mandating that sex-change services—including perhaps surgeries—be covered under the Affordable Care Act. Nondiscrimination in Health Programs and Activities, 80 Fed. Reg, 54172 (Sep. 8, 2015), 54190 ("Based on these principles, an explicit, categorical (or automatic) exclusion of coverage for all health services related to gender transition is unlawful on its face under" the proposed regulation.) But many churches teach that sex change operations are immoral. For example, relying on Matthew 19:4, many Christians believe God created His children individually as male or female, and thus strongly oppose such surgeries on theological grounds.[6]

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[5] *See, e.g.*, Letter from Michelle Rouilard to Mark Morgan, August 22, 2014, available at: http://www.adfmedia.org/files/CalifChurchesComplaint.pdf at 4-5; Complaint, *Foothill Church v. Rouillard*, no. 15-cv-02165 Dkt. #1 (E.D. Cal. Oct. 16, 2015) (challenging California requirement under Free Exercise Clause); AMERICAN CIVIL LIBERTIES UNION, *Public Funding for Abortion*; available at: https://www.aclu.org/public-funding-abortion (arguing for taxpayer-funded abortion).

[6] *See, e.g.*, United States Conference of Catholic Bishops, Comment Letter on Nondiscrimination in Health Programs and Activities (Nov. 6, 2015), available at: http://bit.ly/USCCBcomments; *see also* Roger Severino and Ryan T. Anderson, *Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians*, HERITAGE FOUNDATION, available at: http://bit.ly/SOGIMandate.

Although not all religious denominations share this belief, churches that teach it have tens of millions of U.S. members.[7] They would assuredly object to having to participate in providing sex change operations, either directly, through their health insurance, or less directly, through a legal authorization like the form at issue here. And a finding of no substantial burden in this case would likely embolden HHS to adopt an "accommodation" for houses of worship (as well as nonprofits) that would require them to sign forms like that one, and on that basis participate in the provision of sex-change operations that they view as anathema.

Third, suppose, on the other hand, that a future, more socially conservative administration decided to mandate coverage for services that assist same-sex attracted individuals in changing their attractions to favor members of the opposite sex. *Cf. Pickup* v. *Brown*, 740 F.3d 1208 (2013) (conservative organization claimed a constitutional right to provide such therapy) (subsequent history omitted). Suppose also that a more progressive religious congregation or denomina-

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[7] To name just a few, these churches include the Roman Catholic Church, the Southern Baptist Convention, and the Church of Jesus Christ of Latter-day Saints. *See, e.g.*, John Norton, *Vatican says 'sex-change' operation does not change person's gender*, CATHOLIC NEWS SERVICE (Sep. 19, 2011 revision of a Jan. 14, 2003 article), available at: http://ncronline.org/news/vatican-says-sex-change-operation-does-not-change-persons-gender; On Transgender Identity, SOUTHERN BAPTIST CONVENTION, available at: http://www.sbc.net/resolutions/2250/on-transgender-identity. Adherents of these three denominations alone make up between twenty-five and thirty percent of the national population. *See* Religious Landscape Study, PEW RESEARCH, available at: http://www.pewforum.org/religious-landscape-study.

tions believes such counseling is objectionable on religious grounds because, for example, it encourages people to abandon the sexual orientation given to them by God. Here again, under the Government's theory, the congregation would be unable as a matter of law to mount a RFRA defense if, as here, a judge or bureaucrat second-guessed the congregation's religious judgment and concluded that the asserted burden on religion is insubstantial.

B. The Government's theory would allow automatic foreclosure of RFRA defenses by houses of worship to many other intrusions.

The consequences of the Government's theory would also extend well beyond health insurance.

1. Suppose for example that, in an effort to deport undocumented immigrants, Congress passed a law requiring all membership organizations to disclose their members' names and addresses. Suppose a church objected to such disclosure because it believes it is immoral to expel such immigrants and it does not wish to be complicit in doing so. Under the Government's theory here, the Government could avoid the church's RFRA defense simply by persuading a judge that the causal chain – or array of dominos – between the disclosure of the church's membership list and the deportation of the undocumented immigrant is too attenuated to support the church's complicity concern. After all, before an undocumented immigrant can be deported, he would have to be found and arrested; the Department of Homeland Security would have to conclude he is subject to deportation; an immigration judge would have to sustain the agency's claim of deportability, etc. *See* 8 U.S.C. § 1229a (outlining removal proceedings). And at any rate (the argument

would go), it is the law, not the church's actions, that requires the deportation. Accordingly, even though the church and its members would feel responsible for the deportation, and would believe themselves complicit under their own religious principles, a judge could invoke his own secular views about causation to hold the burden insubstantial.

The Government's theory would also permit a finding of no substantial burden from numerous other intrusions into religious bodies' autonomy. These would include regulations requiring disclosure of membership information for the purpose of enforcing selective service laws, or regulations requiring disclosure of member donations for the purpose of enforcing child support laws, tax laws or bankruptcy laws.

In all of these settings, the Government's theory would allow bureaucrats to offer houses of worship an "accommodation" that itself conflicts with those organizations' religious beliefs (perhaps adding a domino to attenuate the chain of causation), then deny them an exemption on the ground that, in the bureaucrat's view, the accommodation attenuates the organization's complicity sufficiently to eliminate any "substantial" burden.

2. If adopted, this theory would also have a chilling effect on the role of houses of worship in the public square. To fulfill their religious missions, religious organizations often partner with groups that adhere to other faiths, or to no faith at all. But because the Government's theory here relies on the attenuating effect of a relationship between a house of worship and a third party, this Court's adoption of that theory would require religious bodies to re-evaluate all such partnerships.

Indeed, if the Government's substantial burden theory were upheld, houses of worship would become reluctant to partner with any third parties for fear of being required to assist a third party in carrying out what they view as an immoral activity. If the courts won't protect houses of worship from bureaucrats, the houses of worship will have to protect themselves—even if it means limiting their religious missions.

C. By allowing bureaucrats and judges to second-guess religious judgments about complicity, the Government's theory would create continuous social strife over religion.

As these examples demonstrate, the Government's substantial burden theory would allow judges and bureaucrats to second-guess religious judgments across a range of issues, and in ways that would intrude into the religious liberty of socially progressive as well as socially conservative religious bodies. Acceptance of that theory would thereby create continuous social strife over religion and religion-related issues, as ever-more intrusive governments seek to enlist the aid of all social institutions in pursuing whatever objectives the government deems most important. Such "divisiveness based upon religion [would] promote[] social conflict, sapping the strength of government and religion alike." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

Indeed, merely having a court treat as insubstantial a burden that seems substantial to many believers would promote social conflict. That is no doubt why, in the area of conscientious objection to military service, courts have routinely deferred to an objector's

view about what constitutes impermissible participation as "an instrument of war." *Welsh* v. *United States*, 398 U.S. 333, 344 (1970).

Such conflicts would be exacerbated by a finding of insubstantiality here. The consequence of such a finding, of course, is that a court does not even have to *balance* a believer's interests against whatever governmental interests may be at stake. See, *e.g.*, *Holt* v. *Hobbs*, 135 S.Ct. 853, 863 (2015); *Burwell* v. *Hobby Lobby*, 134 S.Ct. 2751, 2779 (2014). Such a conclusion would thus convey that religious interests occupy a subservient position in the pantheon of protected interests.

Acceptance of the Government's theory, moreover, would inevitably lead to the "kinds of religious *favoritism* that in so religiously diverse a Nation, threaten social dissension[.]" *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 724 (2002) (Breyer, J., dissenting) (emphasis added). For example, a more socially conservative government would be more likely to press policies objected to by progressive religious bodies, leading the latter to feel the government is favoring more conservative religions, and vice versa. Such feelings of favoritism would be exacerbated by a regime in which judges and bureaucrats could routinely second-guess religious judgments about both whether a policy burdens religion and how substantial the burden is.

II. The Solution To These Problems Is To Maintain A Test For "Substantial Burden" That Focuses On The Sincerity Of The Religious Belief And The Objective Seriousness Of The Penalty For Non-Compliance.

How can this Court avoid the second-guessing of religious judgments inherent in the Government's theory—and the social strife such second-guessing would create—while preserving the rule of law? The answer, as shown below, is to continue employing a test for "substantial burden" that focuses on the *sincerity* of the belief regarding the religious impact of the regulation, the religious character (or not) of that belief, and on the objective seriousness of the penalty for non-compliance. That approach—along with a reasonable application of strict scrutiny—is the best way to protect third parties against unwarranted intrusions into their fundamental rights by religious individuals and institutions. And it is the approach compelled by RFRA—not to mention the First Amendment.

A. Settled case law establishes that a regulation imposes a substantial burden whenever (a) the claimant sincerely believes that to act as the mandate directs substantially burdens her free exercise and (b) the penalty for non-compliance is objectively substantial.

The case law reveals two criteria for determining whether a law or regulation creates a substantial burden on religion under RFRA.

1. Case law both before and since the enactment of RFRA establish that the substantial burden analysis should focus primarily on whether a claimant *believes* that to act as directed by the law at issue would create

a substantial burden on the claimant's free exercise. This Court's opinions make clear that it is not a judge's role to draw lines about what beliefs are sufficiently central to a person's faith to trigger a substantial burden. As the Court put it in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, "it is not for us to say that the line [the claimant] drew was an unreasonable one. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that [the claimant] terminated his work because of an honest conviction that [his action] was forbidden by his religion." 450 U.S. 707, 715 (1981); *accord Hobby Lobby*, 134 S.Ct at 2778-79 (same). Rather, the question is simply—as this Court unanimously explained last term in applying the very statutory standard at issue here—whether the government action "requires petitioner to [act] and thus to 'engage in conduct that seriously violates [the claimant's] religious beliefs.' " *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015) (citing *Hobby Lobby*, 134 S.Ct. at 2775).

This line of case law also furthers the secular purpose of allowing religious organizations to define their religious missions for themselves. Indeed, just four terms ago this Court expressly recognized that "[t]he Free Exercise Clause protects a religious group's right to shape its own faith and mission[.]" *Hosanna-Tabor* v. *E.E.O.C.*, 132 S.Ct 694, 706 (2012).

The point is illustrated in *Corporation of the Presiding Bishop* v. *Amos*, which rejected an Establishment Clause challenge to a law exempting religious non-profits from prohibitions on religious hiring. 483 U.S. 327, 331, 340 (1987). The Court first explained that such an exemption had a secular purpose: ensur-

ing that religious institutions have the ability to "define and carry out their religious missions." *Id.* at 335. The Court then explained that, because of its religious mission, a religious organization faces a "significant burden" when asked "to predict which of its activities a secular court will consider religious." *Id.* at 336. "[A]n organization might understandably be concerned," the Court observed, "that a judge would not understand its religious tenets and sense of mission." *Id.* And such fear "might affect the way an organization carried out what it understood to be its religious mission." *Id.*[8]

So too here. If courts and bureaucrats could second-guess religious judgments about whether compliance with a regulatory mandate (or prohibition) would substantially burden an institution's religious beliefs, such second-guessing could well "affect the way an organization carried out what it understood to be its religious mission." *Id.*

Preventing this second-guessing of the burdens imposed by government regulations is important for another reason: Any second-guessing of religious judgments by judges or other government officials risks an improper (and even unconstitutional) intrusion into

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[8] Indeed, *Amos*' teaching that courts must respect religious institutions' religious missions is reflected in a recent statute. In 2008, Congress reaffirmed the importance of respecting the religious missions of religious colleges and universities, expressly requiring accrediting bodies to "respect" those institutions' self-defined "missions," "including religious missions." Higher Education Opportunity Act, H.R. 4137 (2008), *codified at* 20 U.S.C. § 1099b(c), (a)(4)(A).

religious matters.[9] As this Court recognized nearly 150 years ago, for churches, many seemingly secular choices are "intimately connected" to religious doctrine. *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 726 (1872). That is why, since at least 1872, church property and autonomy decisions have consistently held that an individual cannot appeal a decision of a church authority to a secular court. *Id.* at 729; *accord Serbian Eastern Orthodox Diocese for United States and Canada* v. *Milivojevich*, 426 U.S. 696, 711 (1976); *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969). This doctrine, moreover, "radiates ... a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952) *accord. Hosanna-Tabor*, 132 S.Ct at 704.

The doctrine prohibiting secular courts from second-guessing religious judgments by ecclesiastical authority has been applied in a number of contexts. It has been applied to preclude government interference in church hiring of ministers, to favor secular criteria for awarding property following a schism, and determining (or declining to determine) who is the proper leader of a faith. *Hosanna-Tabor* 132 S.Ct. at 704; *Kedroff*, 344 U.S. at 116; *Watson*, 80 U.S. at 726. Regardless of the context, the message has been the same: judges and other government officials cannot properly second-

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[9] This Court has long said that this doctrine has a "constitutional ring" to it. *Presbyterian Church in U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 446 (1969).

guess religious judgments made by duly constituted religious authorities.

2. In addition to requiring a sincere religious belief that a regulation substantially burdens a claimant's religion, the case law has examined the objective size or amount of the penalty for non-compliance. That is what a unanimous Court did just last term in *Holt*, when it concluded that the prison regulation there *effectively* "require[d]" the petitioner to "act" in a particular way, i.e. shaving his beard. 135 S.Ct. at 862.[10]

Moreover, such analysis of the objective size of the penalty for non-compliance has long played an important role in this Court's substantial burden analysis. For example, in *Sherbert* v. *Verner*, a Sabbatarian objector to working on Saturday sought unemployment benefits. 374 U.S. 398, 399-401 (1963). In ruling that her request had been improperly denied, the Court suggested that "appellant's declared ineligibility for benefits" pressured her to forego religious exercise and thus supported her claim that the benefits rule substantially burdened her religion. *Id.* at 404; *accord Frazee* v. *Illinois Dept. of Employment Security*, 489 U.S. 829, 835 (1989) (noting that a "denial of benefits" burdens "Frazee's right to exercise his religion.").

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[10] That is also what this Court did in *Hobby Lobby*—a case involving the same statutory penalty as here. In holding that there was a substantial burden there, the Court said:

> "If the [for-profit corporations] do not yield to this demand, ... they will be taxed $100 per day for each affected individual. 26 U.S.C. § 4980D. These sums are surely substantial."

Hobby Lobby, 134 S.Ct at 2775-76.

Likewise, in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981), the Court explained that:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."

Id. at 717-18. In that case too, the Court found that the unemployment benefit the plaintiffs was forced to forego was large enough to support a finding of substantial burden.[11]

In this case, for reasons explained by petitioners, application of the two-pronged substantial burden test is straightforward. *See* Opening Brief of *East Texas Baptist University* at 41-55; Opening Brief of *Zubik* at 27-40. And the religious non-profits in these cases have established that the contraception mandate substantially burdens their religion.

B. The tests applied by the Seventh, Tenth and D.C. Circuits are contrary to precedent—and to the First Amendment—because they invite judges to assess the validity, consistency and/or reasonableness of religious beliefs.

The courts of appeals here misapplied or ignored this Court's established test for determining the existence of a substantial burden on religion.

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[11] Indeed, in *Wisconsin* v. *Yoder*, 406 US 205, 208 (1972), the Court implicitly held that a fine of five dollars was enough to satisfy this element of the substantial burden requirement.

1. In ruling that there was no substantial burden, the Seventh Circuit in *Wheaton College* and *Grace Schools*, the Tenth Circuit in *Little Sisters*, and the D.C. Circuit in *Priests for Life* all misconstrued the claims to be about the actions of the Government, rather than about petitioners' objections to a mandate requiring action from them. In essence, these courts conflated objections to the general use of contraception, or the Government's action of providing contraception, with objections to the act of *assisting* the Government in providing that contraception.[12]

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[12] *See Grace Schools* 801 F.3d at 80 ("contraceptive coverage under the ACA results from federal law, not from any actions required by objectors under the accommodations.") *Wheaton College* v. *Burwell*, 791 F.3d 792, 796 (7th Cir. 2015) ("it is the law, not any action on the part of the college, that obligates insurers" to provide contraception. The Affordable Care Act requires insurers to provide coverage for FDA-approved emergency as well as traditional contraception to Wheaton's students and employees[.]"); *Little Sisters*, 794 F.3d at 1180 ("Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries."). *Priests for Life* 772 F.3d at 256 ("A religious adherent's distaste for what the law requires of a third party is not, in itself, a substantial burden; that is true even if the third party's conduct towards others offends the religious adherent's sincere religious sensibilities."). *But see Little Sisters* 799 F.3d at 1317 (10th Cir. Sep. 3, 2015) (Hartz, J., dissenting from denial of rehearing en banc) (disagreeing with the Tenth Circuit's reframing of the belief of the non-profits in a way that allowed the Tenth Circuit to conclude that there was no objection to filling out the form).

These courts also sidestepped the message of *Hobby Lobby*. In *Hobby Lobby*, for-profit businesses objected to providing contraception for its workers via a health insurance plan. The government argued that "the connection between what the objecting parties must do and the end that they find to be morally wrong

These courts attempted to justify their holdings by invoking a line of this Court's decisions beginning with *Bowen* v. *Roy*, 476 U.S. 693 (1986). *See Grace Schools*, 801 F.3d at 800, 806; *Little Sisters* 794 F.3d at 1175; *Priests for Life*, 772 F.3d at 246, 248-51. But far from foreclosing the substantial burden claim here, *Bowen* and its progeny strongly support the distinction between objecting to governmental action and objecting to a government's requiring the religious *claimant* to act.

That distinction was squarely presented in *Bowen*. There, a Native American father objected to the government's use of a social security number to identify his daughter. 476 U.S. at 696-98. He also separately objected to his daughter's being deprived of welfare benefits because he refused to use the social security number in applying for benefits. *Id.* An eight-Justice majority agreed that the First Amendment did not require the *Government* to forego using Social Security numbers for governmental purposes. *Id.* at 701; *id.* at 713-24 (concurring opinions). But five Justices said the Government should be required to provide services without requiring the *parents* to provide the social security number, if the issue arose on remand. *Id.* at 715-16 (Blackman, J., concurring); *id.* at 724, 732-33 (O'Connor, J. joined by Brennan, J., and Marshall, J., concurring and dissenting); *id.* at 733 (White, J., dissenting).

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is simply too attenuated." 134 S.Ct at 2777. But this Court rejected that argument, noting that the focus should be on the burden on the businesses' religious beliefs, not whether the belief (that there is sufficient complicity) is reasonable. *Id.* at 2778.

This distinction was also suggested in *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988). That case involved a road the Government wished to build through property considered sacred by Native Americans. *Id.* at 441-42. Following the eight-Justice holding in *Bowen*, the Court in *Lyng* explained that the line between constitutional and unconstitutional activities cannot "depend on measuring the effects of a *governmental* action[.]" *Lyng*, 485 U.S. at 451 (emphasis added).

To be sure, *Lyng* did not squarely address any issue of private complicity—because the Government never asked the Native Americans for consent or other forms of assistance in building the road. *See generally id.* But *Lyng*'s analysis obviously did not overrule the clear line in *Bowen* between government and private action.[13]

Unfortunately, the Seventh, Tenth and D.C. Circuit rulings defied *Bowen* and misinterpreted *Lyng*. As in *Bowen*, where five Justices concluded there was no obligation for the parents to use the social security number in applying for benefits (even if the Government used the number internally), so petitioners here object to the contraception mandate only to the extent it requires *them* to give details and sign a form that contradicts their religious beliefs. Unlike *Lyng* — where the Native Americans were not asked to assist in the construction of the objectionable road—here the

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[13] Lower courts have also drawn this distinction. *See, e.g.*, *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. 2008) (a prisoner who objected to the governmental storing of his DNA, but not to his role in the original collection of the DNA, did not have a substantial burden on his free exercise.)

petitioners merely object to the requirement that *they* take a particular action, i.e., signing the HHS form.

2. As Judge Hartz pointed out in his dissent from denial of rehearing *en banc* of the *Little Sisters* decision, the majority opinions in these cases could alternatively be read as acknowledging that petitioners' objection is to signing the form, but holding that this objection is merely an " 'uninformed derivative' " of a more core belief regarding contraception. *See Little Sisters*, 799 F.3d at 1317 (Hartz, J., dissenting from denial of rehearing en banc) That is, since federal law requires coverage of contraception, any action taken by the non-profit is merely incidental to the mandate of the law, and thus cannot give rise to a substantial burden. *See id.*

But that approach is also incorrect. First, the regulations do not simply require the insurance companies to provide contraception, they require the self-insured non-profits—and, indeed, perhaps all non-profits—to participate in an essential step in the Government's plan of providing the coverage through the insurer. See, *e.g.*, *Little Sisters*, 794 F.3d at 1208 (Baldock, J., dissenting) ("In reality, the accommodation scheme forces the self-insured plaintiffs to perform an act that *causes* their beneficiaries to receive religiously objected-to coverage."). Certainly the Government could find an alternate way to provide contraceptives to the employees, but that goes to the least restrictive means test, not substantial burden. The fact that the law requires the Government and the insurer to provide contraception does not make any less real the admitted chain of causation between the contraception and the actions required of petitioners.

Second, in any event, as explained in an analogous setting in *Hobby Lobby*, either framing of the issue "dodges the question that RFRA presents[—]whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to [act] in accordance with *their religious beliefs*." 134 S.Ct. at 2778. Instead, the courts in these cases have inappropriately chosen to "address[] a very different question[:]" whether the non-profits' beliefs about contraception can stop *governmental* action. *Id.* at 2779. But, as in *Hobby Lobby*, that question is simply not presented here.

C. The sincerity requirement, the religious belief requirement, and the compelling interest test ensure that governments can pursue compelling interests while still respecting religious liberty.

Some may worry that a substantial burden test that declines to second-guess religious judgments about the impact of regulations on religion will deprive governments of the ability to pursue compelling interests like protecting children. But that is no cause for concern: The sincerity requirement and the requirement that the belief at issue be a *religious* belief—and the flexibility inherent in the compelling interest test—all give governments ample ability to pursue those interests while still respecting religious liberty.

1. As noted, courts are free to inquire regarding whether a religious belief is sincere—including, as relevant here, religious beliefs about complicity. For example, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) , the Court noted that Amish objectors to compulsory education after the eighth grade were "an identifiable re-

ligious sect" with centuries of evidence that "convincingly demonstrated the sincerity of their religious beliefs." *Id.* at 235.

Perhaps not surprisingly, tenuous claims of sincerity rarely reach the merits stage at this Court. But lower courts—both at the circuit and district level—have regularly disposed of such claims on the basis of sincerity. For example, in *United States* v. *Kuch*, defendant Judith Kuch was a "minister" of a Neo-American Church, which purported to believe in taking LSD as a sacrament. 288 F.Supp. 439, 442 (D. D.C. 1968). When Kuch was arrested for taking LSD, she asserted a free exercise claim as a defense. *Id.* at 442-43. Based on the satirical nature of the church and other factors, the court declined to rule that the church was a religion, and further noted that Kuch "has totally failed in her burden to establish her alleged religious beliefs, an essential premise to any serious consideration of her motions to dismiss." *Id.* at 445.

In this case, of course, sincerity is not at issue. See, *e.g.*, *Little Sisters*, 794 F.3d at 1160 ("We recognize and respect the sincerity of Plaintiffs' beliefs and arguments"); *Priests for Life*, 772 F.3d at 239-40, 249-50 (same). But there is no reason why the sincerity requirement could not be applied to screen out claims of complicity that are truly implausible, or present other indicia of insincerity.

2. In addition to the sincerity inquiry, a claimant must demonstrate that a burden is religious in nature, not merely secular. For example, in *United States* v. *Seeger*, the Court explained that courts must "decide whether the beliefs professed by a registrant are sincerely held and whether they are, in his own scheme of things, religious." 380 U.S. 163, 185 (1965). Of course,

this religiosity inquiry does not ask whether the belief is true, but rather, whether the beliefs are a farce to prevent compliance with an otherwise applicable law. *Cf. Hernandez* v. *Commissioner*, 490 U.S. 680, 693 (1989) (noting that "under the First Amendment, the IRS can reject otherwise valid claims of religious benefit ... on the ground that a taxpayers' alleged beliefs are not sincerely held ...")

Lower courts have also dismissed cases on the ground that the claimant had attempted to reframe a secular belief as religious. For example, in *Mason* v. *General Brown School Dist.*, parents opposed a mandate on immunization as a condition of school enrollment. 851 F.2d 47, 50-52 (2d Cir. 1988). But at trial, the court concluded that the opposition to immunization "was based, not on religious grounds, but on scientific and secular theories." *Id.* at 51. As such, the parents' free exercise of religion was not violated by the mandate. *Id.* at 51-52

Such decisions undoubtedly explain why, to *amici*'s knowledge, no *publicly* traded company has ever even asserted, much less succeeded in bringing, a RFRA claim. This is likely to remain the case, as a company owned by thousands or millions of stockholders is unlikely to be able to demonstrate a relevant belief that is both truly religious and sincere.

As with sincerity, there is no issue in this case as to whether the reasons for petitioners' choices actually are religious rather than secular.

3. The Government or others may also argue that adherence to the traditional substantial burden test would enable religious individuals to act illegally and harm third parties—for example, children who are

sexually abused. *Cf.* Brief of Freedom from Religion Foundation at 3-4 in *Burwell* v. *Hobby Lobby*, 134 S.Ct. 2751 (2014). Such concerns are also misguided, because the second half of RFRA's test—the compelling interest test—forecloses claims that religion provides an excuse, for example, to abuse children or deny them required benefits.

Indeed, this Court has recognized that several governmental programs actual satisfy strict scrutiny. *See, e.g., Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (holding "that student body diversity is a compelling state interest that can justify the use of race in university admissions."); *United States* v. *Lee*, 455 U.S. 252, 258-60 (1982) (concluding that a social security mandate burdens the free exercise rights of the Amish but survives strict scrutiny). So it is not a stretch to imagine that a government with a truly compelling interest could satisfy strict scrutiny as against a RFRA defense.

Likewise, every court of last resort of which counsel is aware to consider issues involving the protection of children has consistently held that laws protecting children from child abuse survive strict scrutiny. Indeed, as the Vermont Supreme Court explained in a case involving child support, child support orders "represent the least restrictive means for the state to further a paramount interest in having parents recognize their obligation to provide material support for their children." *Hunt* v. *Hunt*, 648 A.2d 843, 851 (Vt. 1994). *See also Walker* v. *Superior Court*, 763 P.2d 852, 870 (Cal. 1988) (noting that "[r]egardless of the severity of the religious imposition, the governmental interest [in ensuring medical treatment for children] is plainly adequate to justify its restrictive effect.").

In short, practical concerns about the burdens on third parties do not merit the reshaping of the substantial burden test. RFRA allows governments to protect and pursue compelling governmental interests while still protecting religious liberty.

D. Robust religious liberty—not to mention the First Amendment—requires that the substantial burden test be applied in a way that avoids second-guessing religious judgments about a regulation's religious consequences.

Finally, as this Court's decisions have repeatedly recognized, a robust conception of religious liberty is fundamentally incompatible with any regime that allows bureaucrats or judges to second-guess sincere religious judgments about a regulation's impact on religious practice. Indeed, the mere assertion of *authority* to second-guess such judgments—as the Government's theory in these cases requires—is an affront to the religious liberty protected by the Constitution and, by extension, RFRA.

The Court made this clear most recently in *Hosanna-Tabor*, which unanimously recognized that both the Free Exercise and Establishment Clauses require full deference to ecclesiastical judgments about the choice of ministers. Quoting *Milivojevich*, the Court noted that the First Amendment "permit[s] [] religious organizations to establish their own rules and regulations for internal discipline and government," and that "[w]hen ecclesiastical tribunals decide such disputes

'the Constitution requires that civil courts accept their decisions as binding upon them." 132 S.Ct. at 705 (quoting 426 U.S. at 725). The Court further noted that merely "by *inquiring* into whether the Church had followed its own procedures, the State Supreme Court

[in *Milivojevich*] 'had unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals' of the Church." *Id.* (quoting 426 U.S. at 720).

If that is true of decisions about who will serve as a church's minister—and it is—it is just as true of religious judgments about the impact of a government regulation on religious belief and/or practice. And that includes the religious judgment at the heart of these cases—specifically, how many "dominos" must there be between an action required by a regulation and an outcome the institution believes to be evil, in order to eliminate the institution's moral responsibility for that outcome? As with decisions about who will serve as a church's minister, a decision second-guessing *that* kind of religious judgment is equally objectionable as an improper governmental "resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to" religious authorities.

CONCLUSION

The Court should reverse the decisions below and, in so doing, make clear that a regulation imposes a substantial burden on religion whenever the belief at issue is religious rather than secular, the religious claimant sincerely believes compliance with the regulation imposes a burden on religion, and the penalty for non-compliance is objective substantial. Adoption of that standard will eliminate the governmental second-guessing of religious judgments that is the most offensive feature of these cases. And it will thereby help to protect the religious liberty guaranteed by the Religious Freedom Restoration Act as well as the First Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX

Interests and Descriptions of Particular *Amici Curiae*

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents more than 76,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,400 congregations with more than 1.1 million members.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations with 2,200,000 baptized members. Among these congregations is Hosanna-Tabor Evangelical Lutheran Church, which was the subject of this Court's recent decision in *Hosanna-Tabor* v. *E.E.O.C.*, 132 S.Ct. 694 (2012). The Church supports fully protecting religious freedom under the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act, and it has a fervent interest in safeguarding the free exercise of religion for all.

The Church of God in Christ is the fifth largest Protestant religious denomination and the largest African American church in the United States, with churches in 63 countries worldwide and an estimated membership of nearly 6.5 million members. The Church seeks to protect the religious freedoms of its members and all Americans.

The Orthodox Church in America was established in the Aleutian Islands and Alaska in the 1790s as a missionary initiative of the Russian Orthodox Church. Today the Church is the religious home of thousands of Orthodox Christians worshiping in temples across the country, and was granted independence

from the Russian Church in 1970. The Orthodox Church in America rejoices in the strong value of religious freedom which is one of the hallmarks of American democracy, and it is committed to the effort to ensure full enjoyment of that fundamental freedom.

The American Islamic Congress serves both Muslims and non-Muslims by promoting civil and human rights, including religious freedom. Its programs have reached tens of thousands of people in 40 U.S. states and across the globe. It recognizes that American Muslims have prospered under this country's tradition of religious tolerance, and that American Muslims must champion and protect such tolerance for people of all faiths.

The Queens Federation of Churches, Inc., organized in 1931, is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. More than 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Federation has appeared as amicus curiae previously in a variety of actions to serve the cause of justice. The Federation and its member congregations are vitally concerned that religious liberty be protected in a way that allows any faith community to formulate and to follow the principles of its faith unmolested by governmental veto or trivialization. Any effort by government to compel individuals or religious organizations to engage in actions which they regard as sinful is a burden of such magnitude as to negate any meaningful opportunity freely to exercise religious faith.

The Chaplain Alliance for Religious Liberty ("CALL") is a private, non-profit association that exists

to advocate for and protect the religious liberty of chaplains and those they serve. As a prerequisite to accepting a chaplain for service in the United States Armed Forces, the United States requires that a chaplain be "endorsed" by a religious organization to serve as an official representative of his or her faith group in the Armed Forces. Most of CALL's members and leadership are official representatives of their various faith groups who endorse chaplains for service. This endorsement relationship gives CALL's members an official, ongoing relationship with both the U.S. Armed Forces and with each endorsed chaplain, and it means that CALL speaks on behalf of almost fifty percent of chaplains currently serving in the military. Further, almost all of CALL's members and leadership are military veterans, most of whom served as chaplains. CALL's members are endorsers from over 30 different faith groups, including the American Baptist Association, Anglican Church of North America, Christian and Missionary Alliance, Evangelical Free Church in America, Episcopal Missionary Church, Lutheran Church Missouri Synod, Plymouth Brethren, Presbyterian Church in America, and others.